Supreme Court, U.S.
FILED

97 1019 DEC 18 1997

OFFICE OF THE CLERK

No._____

In The

Supreme Court of the United States

October Term, 1997

BRIDGET O'CONNOR,

Petitioner,

v.

JAMES DAVIS, Dr., ROCKLAND PSYCHIATRIC CENTER, and STATE OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Jonathan Lovett, Esq.
Counsel of Record
Jane Bilus Gould, Esq.
LOVETT & GOULD, ESQS.
Attorneys for Petitioner
11 Martine Avenue
White Plains, New York 10606
(914) 428-8401

PRINTINGHOUSE PRESS 25 WEST 43RD STREET NEW YORK, NY 10036 (212) 719-0990

56 pp

QUESTIONS PRESENTED

1.

Whether a college student who is required to participate in a work/study program involving an internship at a psychiatric hospital in order to earn her college degree, and who in so doing provides a benefit to that hospital by participating in patient treatment subject to the supervision of the hospital, and whose participation in such program is taken into consideration in calculating her financial aid package which included federal work/study funds, should be denied status as an "employee" of that institution for purposes of Title VII, 42 U.S.C. §2000e, *et seq.*, because she does not receive "compensation" in the form of a paycheck?

2.

Whether a psychiatric hospital receiving federal funds while conducting an organized student internship program with several schools, which program involves regular instruction, seminars, work supervision and input into grades for college degree mandated field work, qualifies as an educational program or activity for purposes of Title IX, 20 U.S.C. §1681, *et seq.*?

PARTIES

The names of all current parties appear in the caption of the case.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 1

STATUTORY PROVISIONS INVOLVED IN THE CASE 2

STATEMENT OF THE CASE 4

ARGUMENT 10

POINT I

THE PETITION SHOULD BE GRANTED SO THAT THE SUPREME COURT MAY RESOLVE THE CONFLICT AMONG CIRCUITS ON THE ISSUE OF WHETHER A 'PAYCHECK' IS A *SINE QUA NON* OF STATUS AS AN EMPLOYEE FOR PURPOSES OF TITLE VII, 42 U.S.C. §2000e, *et seq.* 10

POINT II

THE PETITION SHOULD BE GRANTED TO RESOLVE THE ISSUE OF WHETHER AN INSTITUTION WHICH RECEIVES FEDERAL FUNDS AND WHICH CONDUCTS INTERNSHIP PROGRAMS IN CONJUNCTION WITH SEVERAL COLLEGES, IN WHICH IT NOT ONLY

SUPERVISES, BUT PROVIDES INSTRUCTION AND TRAINING TO STUDENTS FOR COLLEGE CREDIT IN MANDATORY FIELD WORK, IS CONDUCTING AN EDUCATION PROGRAM OR ACTIVITY FOR PURPOSES OF TITLE IX, 20 U.S.C. §1681, *et seq.*. 15

CONCLUSION. 19

APPENDIX

A. Decision of the United States Court of Appeals for the Second Circuit dated September 19, 1997, affirming summary judgment and dismissal of Petitioner's complaint. A-1

B. Memorandum and Order of the United States District Court for the Southern District of New York dated May 20, 1996, granting summary judgment and dismissing Petitioner's complaint. A-23

TABLE OF AUTHORITIES

Cases ***Pages***

Christopher v. Stouder Memorial Hosp., 936 F.2d 870 (6th Cir. 1991) 13

Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989) 11

Frankel v. Bally, Inc., 987 F.2d 86 (2d Cir. 1993) 11

Haavistola v. Community Fire Company of Rising Sun, Inc., 6 F.3d 211 (4th Cir. 1993) 12, 13

Jeldness v. Pearce, 30 F.2d 1220 (9th Cir. 1994) 16

Mennone v. Gordon, 889 F.Supp. 53 (D.Conn. 1995) . . . 16

Murray v. New York University College of Dentistry, 57 F.3d 243 (2d Cir. 1995) 15

Neff v. Civil Air Patrol, 916 F.Supp. 710 (S.D. Ohio 1996) 13

North Haven Board of Education v. Bell, 456 U.S. 512 (1982) 15, 16

O'Connor v. Davis, 126 F.3d 112 (2d Cir. 1997) 1, 9, 10, 11, 15, 17, 18

Tadros v. Coleman, 711 F.Supp. 996 (S.D.N.Y. 1989), *aff'd*, 898 F.2d 10 (2d Cir. 1990), *cert. denied*, 498 U.S. 869, *reh'g denied*, 498 U.S. 995 (1990) 12

Women Prisoners of District of Columbia Department of Corrections v. District of Columbia, 899 F.Supp. 659 (D.D.C. 1995) 16, 17

Yusuf v. Vassar College, 35 F.3d 709 (2d Cir. 1994) 15

Statutes

20 U.S.C. §1681, *et seq.* 1, 3, 15

28 U.S.C. §1291 2

28 U.S.C. §1254(1) 2

28 U.S.C. §1331 2

28 U.S.C. §1343(a)(4) 2

28 U.S.C. §1367 2

42 U.S.C. §2000e, *et seq.* 1, 2, 3, 10

Other

34 C.F.R. §106 (1994) 16, 17

45 C.F.R. §88 16

118 Cong.Rec. 5808 (1972) 16

In The

Supreme Court of the United States

October Term, 1997

BRIDGET O'CONNOR,

Petitioner,

v.

JAMES DAVIS, Dr., ROCKLAND PSYCHIATRIC CENTER, and STATE OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals, officially reported as *O'Connor v. Davis*, 126 F.3d 112 (2d Cir. 1997), is annexed hereto as Appendix A. The opinion of the United States District Court for the Southern District of New York, which is not officially reported, is annexed hereto as Appendix B.

JURISDICTIONAL STATEMENT

Petitioner Bridget O'Connor brought this action pursuant to Title IX, 20 U.S.C. §1681, *et seq.*, and Title VII, 42 U.S.C.

§2000e, *et seq.*, to redress acts of sexual harassment. Petitioner invoked the District Court's jurisdiction pursuant to 28 U.S.C. §§1331 and 1343(a)(4).[1] Petitioner's related state law claims were interposed in accordance with the Court's supplemental jurisdiction, 28 U.S.C. §1367.

The District Court granted Respondents' motion for summary judgment and dismissed the action in a Memorandum and Order dated May 20, 1996. Judgment was filed and entered on May 23, 1996. A Notice of Appeal was timely filed on June 11, 1996.

The jurisdiction of the United States Court of Appeals for the Second Circuit was invoked pursuant to 28 U.S.C. §1291. By Judgment dated September 19, 1996, the Court of Appeals affirmed the District Court's dismissal of the complaint.

In accordance with Rule 13.1 of this Court, this petition is filed within 90 days of entry of judgment of the Court of Appeals. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED IN THE CASE

Chapter 42, Section 2000e(f) of the United States Code (1994), provides in pertinent part:

---

1 Petitioner timely filed a charge of discrimination (#160-95-080) with the Equal Employment Opportunity Commission. The Equal Employment Opportunity Commission issued Petitioner a Right to Sue letter on February 15, 1995.

> The term "employee" means an individual employed by an employer ....

Chapter 42, Section 2000e-2(a) of the United States Code (1994), provides in pertinent part:

> It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin ....

Chapter 20, Section 1681(a) of the United States Code (1994), provides in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ....

Chapter 20, Section 1681(c) of the United States Code (1994), provides in pertinent part:

> For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education ....

STATEMENT OF THE CASE

A. Bridget O'Connor's Relationship with Rockland Psychiatric Center

Petitioner Bridget O'Connor was enrolled as an undergraduate student at Marymount College. As a Marymount College student, O'Connor majored in social work and graduated with a bachelor of science in social work. The course of study for O'Connor's degree in social work mandated extensive field work: 100 hours in her junior year and 200 hours in each semester of her senior year.

O'Connor was not able to freely choose her field work assignment. Instead, she had to apply for placement at an area facility through the College. In that connection, O'Connor was assigned to Rockland Psychiatric Center (hereinafter "RPC").

On September 20, 1995, O'Connor attended a "Social Work Department Field Student Orientation", which RPC held for several interns working at the facility. In addition to this orientation, RPC regularly organized and provided intern education through weekly seminars during which interns were taught about medications, mental illness, patient treatment, and other related topics.

While working at RPC, intern O'Connor was supervised by Lisa Punzone (hereinafter "Punzone"), a clinical social worker at RPC. O'Connor also worked for Dr. James Davis (hereinafter "Dr. Davis"), a treating psychiatrist at RPC.

As an RPC intern, O'Connor was assigned patients with whom she met regularly for one-on-one counseling sessions. In addition, O'Connor ran group therapy sessions and attended family therapy sessions while interning at RPC.

Punzone and other RPC staff members introduced O'Connor to patients as an "intern", not a "volunteer".

Intern O'Connor documented her sessions with patients in "process recordings", which were reviewed by RPC's supervising social worker Punzone. In addition, intern O'Connor regularly attended morning staff meetings along with RPC social workers and other interns during which they discussed patient treatment, progress and problems. As a result of her process recordings and participation in staff meetings, O'Connor contributed to patient treatment plans developed by RPC staff.

In connection with her work assignments and work/study related supervision, O'Connor's performance as an intern was evaluated by supervising social worker Punzone. In turn, this evaluation was provided to Marymount College and considered in determining O'Connor's grade for the field work which was required for her degree.

In addition to college credits required for her degree, intern O'Connor received federal financial aid because her field work internship at RPC was considered work study. Accordingly, she was compensated with federal funds for the hours she worked at RPC as an intern; this compensation was a part of her financial aid package from the College.

In reaching the conclusion that O'Connor was not an employee for purposes of Title VII, the Circuit Court found that the issue of remuneration was dispositive and apparently because she did not receive a paycheck, relegated her to the status of volunteer. However, the evidence was clear that RPC "volunteers" rendered a variety of services materially different from the work performed by intern O'Connor. For example, RPC volunteers perform the following functions:

- "Arts and Crafts Assistant" helping patients participate in arts and crafts activities;
- "Church Escorts" transporting patients to religious services;
- "Clothing Boutique Assistant" helping to clothe patients;
- "Community Advisory Board (CAB) Member" planning fund-raising and special events;
- "Entertainer" performing for patients; and, *inter alia,*
- "Friendly Companion" visiting patients and engaging them in leisure activities.

As set forth *supra*, O'Connor did not function at RPC in any of these "volunteer" capacities. On the contrary, she worked at RPC as a social work intern.

O'Connor was part of a regular program RPC conducted with Marymount College and other schools whereby students were placed in various departments at RPC to perform social work as interns under the supervision of RPC personnel. In exchange for providing patient treatment at RPC, the interns received clinical education and satisfied compulsory patient treatment requirements for their degrees. In addition, O'Connor received work study compensation for the hours she worked at RPC as part of her College's financial aid package.

B. Davis' sexually inappropriate behavior

Within the first week of her internship at RPC, O'Connor encountered Dr. James Davis. He regularly referred to O'Connor in a sexually offensive manner throughout her

internship at RPC. Indeed, Dr. Davis made a series of sexually inappropriate comments to O'Connor which clearly amounted to actionable sexual harassment under the Second Circuit's prevailing Title VII standard.

In that connection, Dr. Davis admitted making some of these comments to Plaintiff. In addition, he admitted engaging in sexually offensive jokes, innuendoes and conduct with other female RPC staff members.

C. RPC's knowledge of Dr. Davis' sexually inappropriate behavior.

Despite the lack of any sexual harassment complaint procedure at RPC, intern O'Connor promptly reported Dr. Davis' comments to her RPC supervising social worker Punzone in September 1994. After O'Connor advised Punzone that his inappropriate comments offended her, Punzone informed O'Connor that Davis had made similar comments to Punzone herself, as well as to other staff members. Apparently resigned to Dr. Davis' sexually inappropriate conduct, Punzone simply advised O'Connor to ignore his comments.

In November 1994, after one of Dr. Davis' particularly offensive comments, O'Connor was so obviously upset by Davis that Punzone asked what was bothering her. O'Connor explained Dr. Davis' comment. Punzone's suggestion was to ignore Davis. O'Connor, who was particularly upset by the comments because she had been sexually assaulted at the age of fourteen, again made it clear to Punzone that the comments upset her.

D. RPC's failure to take remedial action.

Although O'Connor complained about Dr. Davis' sexually inappropriate behavior throughout the fall semester of her internship, supervisor Punzone did not report O'Connor's complaints to her team leader, James Wagner (hereinafter "Wagner"), until January 1995. Wagner was, however, already aware of Davis' behavior.

Notwithstanding the fact that both RPC supervising social worker Punzone and RPC team leader Wagner had knowledge of the harassment, RPC took no action regarding Dr. Davis' sexually inappropriate behavior until intern O'Connor complained to Virginia T. Kaiser (hereinafter "Kaiser"), Marymount College's Social Work Field Instructor. Kaiser brought the issue to the attention of Madeline Connolly (hereinafter "Connolly"), RPC's Director of Social Work in January of 1995.

Incredibly, RPC Director Connolly herself had previously experienced Dr. Davis' telling of off-color stories, twisting neutral comments into sexual innuendoes and making sexual references. However, she had taken no remedial action to stop his sexually offensive conduct.

After instructor Kaiser reported intern O'Connor's complaint to RPC Director Connolly, Connolly notified Wilbur T. Aldridge (hereinafter "Aldridge"), RPC's affirmative action administrator. In addition to reporting O'Connor's complaint, Director Connolly advised administrator Aldridge of her own experiences with Dr. Davis' sexually inappropriate stories, comments and behavior.

Administrator Aldridge learned of several individuals affected by Dr. Davis' sexually offensive conduct. Indeed,

everyone with whom Aldridge spoke confirmed Dr. Davis' propensity for sexually inappropriate behavior. Despite the results of his inquiry, Aldridge discontinued his investigation of intern O'Connor's complaint after the instant civil action was instituted and RPC has taken no remedial action against Dr. Davis.

E. The instant litigation.

On March 13, 1995, Bridget O'Connor commenced the instant action pursuant to Title VII and Title IX to redress acts of sexual harassment. Petitioner initially named as Defendants Dr. James Davis, Dr. Virginia Kaiser, James Wagner, Madeline Connolly, Lisa Punzone, Marymount College, the Rockland Psychiatric Center, and the State Of New York.

During the pendency of the action, Petitioner discontinued her claims against Defendants Marymount College and instructor Kaiser on August 7, 1995. Thereafter, Petitioner discontinued her claims against Defendants Dr. Davis, social worker Punzone, team leader Wagner and Director Connolly on January 23, 1996.

Following discovery, the Respondents moved for summary judgment. The District Court never reached the issue of whether O'Connor was subjected to sexual harassment. Rather, the District Court held that Plaintiff was not an employee of RPC for purposes of Title VII and that RPC was not an educational institution for purposes of Title IX. Accordingly, the District Court granted summary judgment and dismissed the complaint in a Memorandum and Order dated May 20, 1996. Petitioner timely filed a Notice of Appeal dated June 11, 1996.

The Second Circuit Court of Appeals wrote that it was "not unsympathetic to O'Connor's situation". *O'Connor*, 126 F.3d

at 119. Indeed, the Circuit Court recognized that Plaintiff's scholastic success was dependent on her success at RPC. *Id.* As a result, the Circuit Court conceded that O'Connor was not free to walk away from her internship in the same manner that a volunteer is free to discontinue her service. *Id.* In fact, the Circuit Court agreed that the necessity for O'Connor's completing her internship was similar to the necessity of any other employee to earn wages, which made her vulnerable to on-going harassment in the same fashion as an employee is vulnerable to on-going misconduct. *Id.*

Nevertheless, the Circuit Court held that O'Connor was not an RPC employee for purposes of Title VII and that RPC was not an administrator of an "educational program or activity" for purposes of Title IX. *Id.* at 116, 119. Consequently, it affirmed the District Court's dismissal of O'Connor's complaint. *Id.* at 119. For the reasons set forth *infra*, certiorari to the Supreme Court is appropriate.

POINT I

THE PETITION SHOULD BE GRANTED SO THAT THE SUPREME COURT MAY RESOLVE THE CONFLICT AMONG CIRCUITS ON THE ISSUE OF WHETHER A "PAYCHECK" IS A *SINE QUA NON* OF STATUS AS AN EMPLOYEE FOR PURPOSES OF TITLE VII, 42 U.S.C. §2000e, *et seq.*

In rendering its decision, the United States Court of Appeals for the Second Circuit held that "the preliminary question of remuneration is dispositive in this case," 126 F.2d at 116, and that because "the absence of either direct or indirect economic remuneration or the promise thereof is

undisputed, Bridget O'Connor was not a Rockland Psychiatric Center ("RPC") employee within the meaning of Title VII." *Id.* The Court of Appeals noted in its opinion that O'Connor was not "hired" by RPC and opined that "only where a 'hire' has occurred" should the common-law agency test [of the employer-employee relationship] as set forth in *Community for Creative Non-Violence v. Reid* 490 U.S. 730 (1989), and which depends on the "totality of the circumstances," *Frankel v. Bally, Inc.*, 987 F.2d 86, 90 (2d Cir. 1993) be undertaken. *O'Connor,* 126 F.3d at 115.

The Court of Appeals reached this determination in the face of the undisputed fact that the field work represented by O'Connor's internship at RPC was required in order to obtain her college degree in social work and its own acknowledgment that "from her perspective, her success at Marymount [College] was dependent to some degree on successfully completing her internship with Rockland, and that her dependency on Rockland made her vulnerable to continued harassment much as an employee dependent on a regular wage can be vulnerable to ongoing misconduct." *Id.* at 119.

Moreover, the Court of Appeals rejected as material the undisputed fact that the work study internship program in which O'Connor participated was considered in calculating her financial aid package, which included federal work study funds. *Id.* at 116 n.2.

Finally, the Circuit Court arrived at its determination notwithstanding the undisputed fact that O'Connor was counseling clients and generally participating in patient treatment and, thus, in fulfilling the mission of RPC during the course of her internship. Since RPC, the "putative employer," willingly derived a benefit from O'Connor's services, this

opinion appears to be inconsistent with the Court's own dictum in *Tadros v. Coleman*, 711 F.Supp. 996 (S.D.N.Y., 1989), *aff'd*, 898 F.2d 10 (2d Cir., 1990), *cert. denied*, 498 U.S. 869, *reh'g denied*, 498 U.S. 995 (1990), where it wrote:

> "It is axiomatic that a would-be plaintiff must have rendered the defendant some kind of service in order to sue under Title VII. That service, moreover, must have been one from which the putative employer willingly derived benefit."

Id. at 1003.

Critical to a resolution of this Petition for Certiorari is that the holding of the Second Circuit conflicts with the holding of the Fourth Circuit in *Haavistola v. Community Fire Co. of Rising Sun, Inc.*, 6 F.3d 211 (4th Cir. 1993), in which that Court of Appeals noted that although the Plaintiff was not paid a salary for her service as a member of a Volunteer Fire Company, she did "not affiliate with the company without reward entirely," *Id.* at 221. The Court went on to list benefits that she did receive, including, *inter alia*, a state-funded disability pension, scholarships for dependents upon disability or death, group life insurance, tuition reimbursement for courses in emergency medical and fire service techniques, and access to a method by which she may obtain certification as a paramedic.

The Court of Appeals for the Fourth Circuit concluded in *Haavistola* that "Because compensation is not defined by statute or case law we hold that it cannot be found as a matter of law," and that a fact finder must determine whether the listed benefits and others represent "indirect but significant remuneration ,. . . or inconsequential incidents of an otherwise gratuitous relationship." *Id.*

In dictum, the District Court in *Neff v. Civil Air Patrol*, 916 F.Supp 710 (S.D.Ohio 1996), also suggested the need for guidance from the Supreme Court on the issue of whether there are any circumstances in which the receipt of a paycheck is not the *sine qua non* of a Plaintiff's status as an employee for purposes of Title VII. There, the District Court, on its own motion, reconsidered its prior ruling denying the Defendant's Motion for Summary Judgment, reversed itself after "revisiting the issue" and granted judgment in favor of the Defendant.

In finally rejecting Plaintiff's claim that her relationship to the Civil Air Patrol was that of an employee for purposes of Title VII, the *Neff* Court attempted to distinguish the facts of that case from that of *Haavistola, supra.* First the *Neff* Court referred to the Sixth Circuit's "economic realities" test as set forth in *Christopher v. Stouder Memorial Hosp.*, 936 F.2d 870, 875 (6th Cir. 1991), which "requires a plaintiff to demonstrate there her position with the putative employer was one that either looked like an employment relationship . . . or was likely to affect an employment relationship," it held that "a Plaintiff may be considered an employee whenever significant economic interests are at stake in her relationship with her putative employer." *Neff, supra* at 715.

However, in referring to the criteria set forth in *Haavistola, supra,* the *Neff* Court noted that unlike the Plaintiff in *Haavistola,* the Plaintiff "did not use the CAP [Civil Air Patrol] as a stepping stone to another position and did not need to participate in CAP as a coincident with another occupation." *Id.* at 715.

In the case at bar, it is manifest that the Plaintiff was required to participate in the Rockland internship in order to

earn her degree; it must be similarly undisputed that a college degree is a prerequisite to a career as a social worker; in other words significant, albeit, future, economic interests were at stake in her relationship with RPC.

In view of the foregoing conflict among the Circuits and the clear need for guidance from the Supreme Court on the unresolved issue of whether a paycheck is a *sine qua non* of a Plaintiff's status as an employee for purposes of Title VII, and in view of the ramifications of the Second Circuit's opinion, which, if permitted to stand, removes from the reach of Title VII student interns who, like Bridget O'Connor, are required to engage in field work in order to earn their college degrees, and who in doing so provide a benefit to their putative employers, this Petition for a Writ of Certiorari should be granted.

POINT II

THE PETITION SHOULD BE GRANTED TO RESOLVE THE ISSUE OF WHETHER AN INSTITUTION WHICH RECEIVES FEDERAL FUNDS AND WHICH CONDUCTS INTERNSHIP PROGRAMS IN CONJUNCTION WITH SEVERAL COLLEGES, IN WHICH IT NOT ONLY SUPERVISES, BUT PROVIDES INSTRUCTION AND TRAINING TO STUDENTS FOR COLLEGE CREDIT IN MANDATORY FIELD WORK, IS CONDUCTING AN EDUCATION PROGRAM OR ACTIVITY FOR PURPOSES OF TITLE IX, 20 U.S.C. §1681, *et seq.*

Title IX prohibits gender based discrimination in any educational program or activity receiving federal financial assistance. 20 U.S.C. §1681(a). Title IX's protection from gender discrimination extends to both students and employees participating in programs which are within the ambit of the act. *Murray v. New York University College of Dentistry*, 57 F.3d 243, 248 (2d Cir. 1995), *citing, North Haven Board of Education v. Bell*, 456 U.S. 512, 520-535 (1982).

In reviewing Title IX claims "courts have generally adopted the same legal standards that are applied to such claims under Title VII." *Murray,* 57 F.3d at 248; *see also, Yusuf v. Vassar College*, 35 F.3d 709, 714 (2d Cir. 1994). As set forth *supra*, the record clearly established that O'Connor was sexually harassed under Title VII standards. Nonetheless, the Second Circuit Court of Appeals held that O'Connor could not pursue a Title IX claim against RPC because it did not conduct an "education program or activity". *O'Connor,* 126 F.3d at 119. This conclusion was erroneous.

Title IX must be accorded "a sweep as broad as its language". *North Haven*, 456 U.S. at 521. Accordingly, the court in *Mennone v. Gordon*, 889 F.Supp. 53 (D.Conn. 1995), recognized administrative regulations which stated that "Title IX was designed to eliminate sex discrimination under any education program or activity receiving Federal financial assistance, '**whether or not such program or activity is sponsored by an educational institution** ....'" *Id.* at 56, *quoting* 34 C.F.R. §106 (emphasis added).

"Recipients" of federal financial assistance include "any State or political subdivision thereof, or any instrumentality thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates as an education program or activity which receives or benefits from such assistance ...." *Id.* Accordingly, *Mennone* held that Title IX applied to individuals. 889 F.Supp. at 56-58.

The Ninth Circuit reached a similar conclusion using similar logic regarding prison education programs in *Jeldness v. Pearce*, 30 F.2d 1220, 1226 (9th Cir. 1994), *citing* 45 CFR §86. The same conclusion should have been reached with respect to RPC.

Indeed, the RPC program at issue falls within the legislative intent of Title IX. When Title IX was presented in Congress, it was plainly announced that it was "meant to expand employment opportunities for women". *Women Prisoners of District of Columbia Department of Corrections v. District of Columbia*, 899 F.Supp. 659, 668-669 (D.D.C. 1995), *citing* 118 Cong.Rec. 5808 (1972). Thus, "[a] recipient

of federal funding may not discriminate on the basis of sex in the following educational programs or activities: industrial, physical education, vocational, technical." *Women Prisoners*, 899 F.Supp. at 669, *citing* 34 C.F.R. §106.34 (1994).

Significantly, "Vocational education is preparation for the pursuit of a technical, skilled, or semiskilled occupation or trade, or study in a technical field, **whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers full-time study.**" *Women Prisoners*, 899 F.Supp. at 669 n.10, *citing* 34 C.F.R. §106.2(n) (1994) (emphasis added).

It is unchallenged that RPC is a "recipient" of federal financial assistance. *O'Connor*, 126 F.3d at 117 n.3. Furthermore, the RPC provides vocational training through an organized educational program. Student interns at RPC are provided an orientation and regular weekly seminars regarding medications, mental illness, patient treatment, and other related topics, in addition to structured practical and clinical instruction in the technical field of social work. O'Connor participated in this program and was placed at RPC to satisfy her college degree requirements. In addition, she received federal financial aid through her college for her work at RPC. Thus, the RPC internship program is manifestly an educational activity.

Considering all of the foregoing, Title IX should apply to the RPC. Nonetheless, the Second Circuit rejected Petitioner's Title IX claim. The Circuit Court expressly recognized that the 1988 Amendments to the statute broadened the applicability of Title IX, so that any program at an institution receiving federal funds would be covered, whether or not the program received funds directly. *Id.*

Accordingly, the Circuit Court based its rejection of Petitioner's claim on a holding that RPC had not conducted an educational program or activity. In reaching this conclusion, the Circuit Court expressly recognized that the term "education" is not defined by statute nor regulation, and had not been construed by that court. *Id.* at 118. Despite the numerous indicia of an educational training program, the court declined "to convert [RPC's] willingness to accept volunteers into conduct analogous to administering an 'education program' as contemplated by Title IX." *Id.*

Given the number of students participating in organized internship programs at federally funded entities working in connection with colleges and universities to provide training and work experience pursuant to a college degree requirement, the status of such institutions for purposes of Title IX warrants clarification by the Supreme Court. Accordingly, this Petition for Certiorari should be granted.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,
Jonathan Lovett
Counsel of Record
Jane Bilus Gould
LOVETT & GOULD, ESQS.
Attorneys for Petitioner
11 Martine Avenue
White Plains, N.Y. 10606
(914) 428-8401

APPENDICES

APPENDIX A

United States Court of Appeals

FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III, CLERK

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 19th day of September, one thousand nine hundred and ninety-seven.

PRESENT: HON. John M. Walker, Jr.
HON. Fred I. Parker
HON. Gerald W. Heaney*
Circuit Judges

Docket No: 96-7769

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED SEP 19 1997
GEORGE LANGE III, CLERK/stamp

BRIDGET O'CONNOR,
Plaintiff-Appellant,

v.

JAMES DAVIS, DR., ROCKLAND PSYCHIATRIC CENTER, and STATE OF NEW YORK,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED, and DECREED that the judgment of said district court be and it hereby is affirmed in accordance with the opinion of this court.

For the Court
GEORGE LANCE III, Clerk
By: Beth J. Meador/signature
Beth J. Meador
Administrative Attorney

* The Honorable Gerald W. Heaney of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

ISSUED AS MANDATE

OCT 17 1997/stamp

RECEIVED OCT 20/stamp

126 F.3d 112
74 Fair Empl.Prac.Cas. (BNA) 1561
(Cite as: 126 F.3d 112)

Bridget O'CONNOR, Plaintiff-Appellant,

v.

James DAVIS, Dr., Rockland Psychiatric Center, and State of New York,

Defendants-Appellees.

No. 728 Docket 96-7769.

United States Court of Appeals,

Second Circuit.

Argued Jan. 29, 1997.

Decided Sept. 19, 1997.

College student sued state and hospital, claiming that doctor subjected her to sexual harassment in violation of Title VII and Title IX, while she worked as volunteer intern. The United States District Court for the Southern District of New York, Charles L. Brieant, J., granted summary judgment in favor of hospital and state. Student appealed. The Court of Appeals, Walker, Circuit Judge, held that: (1) student was not employee under Title VII, and (2) hospital was not transformed into administrator of education program or activity under Title IX by permitting student to perform volunteer field work at its facility.

Affirmed.

[1] FEDERAL COURTS k802
170Bk802

On appeal from grant of summary judgment, all evidence would be viewed in light most favorable to nonmoving party. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[2] MASTER AND SERVANT k1
255k1

When Congress uses term "employee" without defining it with precision, courts should presume that Congress had in mind conventional master-servant relationship as understood by common-law agency doctrine.

[3] MASTER AND SERVANT k1
255k1

Common feature shared by both employee and independent contractor is that they are hired parties, and thus, prerequisite to considering whether individual is one or the other under common-law agency principles is that individual have been hired in the first instance.

[3] MASTER AND SERVANT k5
255k5

Common feature shared by both employee and independent contractor is that they are hired parties, and thus, prerequisite to considering whether individual is one or the other under common-law agency principles is that individual have been hired in the first instance.

[4] MASTER AND SERVANT k1
255k1

Courts turn to common-law principles to analyze character of economic relationship only in situations that plausibly approximate employment relationship.

[5] MASTER AND SERVANT k1
255k1

If no financial benefit is obtained by purported employee from employer, no plausible employment relationship of any sort can be said to exist; although compensation by putative employer to putative employee in exchange for his services is not sufficient condition, it is essential condition to existence of employer-employee relationship.

[6] CIVIL RIGHTS k143
78k143

College student was not employee, under Title VII, of psychiatric hospital where she spent volunteer internship as part of her studies in social work; although college paid student, with federal work study funding, for hours spent at hospital, hospital provided student with no direct or indirect economic remuneration or promise thereof. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e(f).

[7] CIVIL RIGHTS k127.1
78k127.1

State-run psychiatric hospital that received federal money was not transformed into administrator of education program or activity under Title IX, by permitting student-intern from college with which hospital had no affiliation to perform volunteer field work at its facility; hospital accepted no

tuition, had no teachers or evaluation process, required no regular hours or course of study for volunteer workers, did not share staff with college, and did not circulate funds with college. Education Amendments of 1972, § 908, as amended, 20 U.S.C.A. § 1687; 34 C.F.R. § 106.2.

[8] STATUTES k206
361k206

Court is bound, under ordinary rules of statutory construction, to give content to entire phrase selected by Congress.

[9] CIVIL RIGHTS k127.1
78k127.1

To implicate Title IX in the first instance, entity must have features such that one could reasonably consider its mission to be, at least in part, educational. Education Amendments of 1972, § 901(a), as amended, 20 U.S.C.A. § 1681(a).

***113** Craig T. Dickinson, White Plains, NY (Jonathan Lovett, Lovett & Gould, White Plains, NY, on the brief), for Plaintiff-Appellant.

Janine M. Spinnato, Assistant Attorney General, New York City (Dennis C. Vacco, Attorney General, New York City, Thomas D. Hughes, Assistant Attorney General, New York City, on the brief), for Defendants-Appellees.

Before: WALKER, PARKER, and HEANEY [FN*], Circuit Judges.

FN* The Honorable Gerald W. Heaney of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

WALKER, Circuit Judge:

Plaintiff-appellant Bridget O'Connor ("O'Connor") appeals from the May 23, 1996, judgment of the United States District Court for the Southern District of New York (Brieant, J.) granting the summary judgment motion of defendants-appellees Rockland Psychiatric Center ("Rockland") and the State of New York and dismissing O'Connor's sexual harassment claims, which were brought pursuant to both Title VII of the Civil Rights Act of 1964, § 706(e), as amended, 42 U.S.C. § 2000e, et seq. ("Title VII"), and Title IX of Education Amendments of 1972, § 901(a), as amended, 20 U.S.C. §§ 1681, et seq. ("Title IX"). For the following reasons, we affirm.

BACKGROUND

While enrolled as a student at Marymount College ("Marymount"), a private Catholic college located in Tarrytown, New York, Bridget O'Connor majored in social work. As a component of her major, O'Connor was required during her senior year to perform 200 hours of field work at one of several Marymount-approved organizations which, in the past, had included schools, daycare centers, community organizations, correctional facilities, and social service agencies. Marymount arranged for O'Connor to be placed for her senior-year internship with Rockland, a hospital for the mentally disabled operated by New York State. Because this internship was considered to be "work study" for financial aid purposes, O'Connor received, through Marymount, federal work study funds for the time she spent performing her volunteer work with Rockland.

O'Connor's internship with Rockland began on September 20, 1994. The hours O'Connor worked were flexible, although she generally chose to work on Mondays and Wednesdays from approximately 8:00 a.m. to 4:30 p.m. because that schedule did not conflict with her regular Marymount classes. O'Connor regularly attended morning staff meetings with Rockland employees and other volunteers, met with the patients assigned to her both one-on-one and in groups. She then documented the results of these patient sessions in "process recordings" which were given first to her Rockland supervisor, Lisa Punzone ("Punzone"), and then to faculty at Marymount.

Dr. James Davis ("Davis") worked as a licensed psychiatrist at Rockland. Approximately two days after O'Connor began her internship, Davis referred to O'Connor, in her presence, as "Miss Sexual Harassment"—a term Davis later explained was intended, as a compliment, to convey the idea that O'Connor was physically attractive and, as such, was likely to be the object of sexual harassment. O'Connor promptly complained about Davis's comment to Punzone, who explained that Davis made similar comments to her, and that O'Connor should try her best to ignore him.

Not only did Davis continue to address O'Connor as "Miss Sexual Harassment," he added to his repertoire of inappropriate sexual remarks. For instance, on one Monday morning, Davis told O'Connor that she *114 looked tired, and that she and her boyfriend must have had "a good time" the night before. On another occasion, Davis pointed to a picture in a newspaper of a woman dressed only in underwear and announced that O'Connor was the woman photographed. He also suggested to O'Connor (and other women present) that they should participate in an "orgy." Finally, on yet another

occasion, Davis told O'Connor to remove her clothing in preparation for a meeting with him; he explained, "Don't you always take your clothes off before you go in the doctor's office?"

O'Connor was apparently not Davis's only target; he also commented regularly on the physical appearance of a number of women employed at Rockland, and directed sexual jokes and sexually suggestive noises at them—particularly, as Davis put it, on occasions when he thought the women "looked very well that day." Davis also made "jokes" about female patients—suggesting in one instance that a women patient would benefit from sterilization and, on another occasion, when considering a woman patient who was an incest victim, stating: "the family that plays together stays together."

Although O'Connor reported a good deal of this conduct to Punzone, Punzone did not report any of O'Connor's complaints to James Wagner, her own supervisor, until January of 1995. And when Wagner learned of O'Connor's encounters with Davis, he, like Punzone, did nothing to remedy the situation.

Also in January of 1995, O'Connor complained to Virginia Kaiser, Marymount's social work field instructor, who in turn brought Davis's conduct to the attention of Madeline Connolly, Rockland's director of social work. Connolly then notified Wilbur T. Aldridge, Rockland's affirmative action administrator, who thereafter investigated O'Connor's complaint.

Finally, at some point in January of 1995, O'Connor left Rockland; however, Marymount arranged for her to complete her internship at another facility.

In March of 1995, O'Connor filed the instant action against Marymount, Rockland, the State of New York, and various Marymount and Rockland employees, alleging, inter alia, sexual harassment in violation of Title VII, 42 U.S.C. § 2000e, et seq., and Title IX, 20 U.S.C. §§ 1681, et seq. The action was eventually discontinued against Marymount, Punzone, Wagner, Connolly, and Davis himself. The remaining defendants (Rockland and New York State) moved for summary judgment on several grounds. First, they argued that the plaintiff's Title VII claim should be dismissed because O'Connor was not an "employee" of Rockland within the meaning of Title VII. Second, the defendants argued that the Title IX claim should be dismissed because Rockland was not an "educational institution" as set forth in Title IX. Finally, the defendants argued that O'Connor failed to establish a prima facie case of sexual harassment.

In an opinion and order dated May 20, 1996, the district court granted the defendants' summary judgment motion, agreeing that O'Connor was not an "employee" under Title VII and that Rockland was not an "educational institution" under Title IX. [FN1] Because of this disposition, the district court did not reach the defendants' assertion that O'Connor failed to establish a prima facie case of sexual harassment.

> FN1. In a ruling not challenged on appeal, the district court also found that the plaintiff had abandoned the claims she brought pursuant to 42 U.S.C. § 1983.

DISCUSSION

[1] Summary judgment may not be granted unless the court determines that there are no genuine issues of material fact in dispute and that the moving party is entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2509- 10, 91 L.Ed.2d 202 (1986). Because summary judgment was granted against O'Connor, we consider all of the evidence in the light most favorable to her. *See Kracunas v. Iona College*, 119 F.3d 80, 82-83 (2d Cir.1997).

*115 I. Title VII

O'Connor's first argument on appeal is that the district court improperly concluded that she was not a Rockland employee within the meaning of Title VII. She argues that although she worked at Rockland as an unpaid intern, she nevertheless satisfies the common-law agency definition of "employee." We disagree.

[2] The definition of the term "employee" provided in Title VII is circular: the Act states only that an "employee" is an "individual employed by an employer." 42 U.S.C. § 2000e(f); *see also EEOC v. Johnson & Higgins*, 91 F.3d 1529, 1538 (2d Cir.1996). However, it is well established that when Congress uses the term "employee" without defining it with precision, courts should presume that Congress had in mind "the conventional master-servant relationship as understood by the common-law agency doctrine." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23, 112 S.Ct. 1344, 1348, 117 L.Ed.2d 581 (1992) (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40, 109 S.Ct. 2166,

2172-73, 104 L.Ed.2d 811 (1989)); *see also Walters v. Metropolitan Educ. Enters., Inc.*, — U.S. ——, ——, 117 S.Ct. 660, 666, 136 L.Ed.2d 644 (1997); *Frankel v. Bally, Inc.*, 987 F.2d 86, 90 (2d Cir.1993).

In most cases where an attempt has been made to discern the contours of the "conventional master-servant relationship," it has been because a court has been asked to consider whether, under a particular statute, a party is an employee or an independent contractor. *See, e.g., Reid,* 490 U.S. at 739-40, 109 S.Ct. at 2172-73 (considering the Copyright Act of 1976, 17 U.S.C. §101); *Darden,* 503 U.S. 318, 322-23, 112 S.Ct. 1344, 1348, 117 L.Ed.2d 581 (1992) (considering ERISA, 29 U.S.C. § 1132(a)); *Alford v. United States,* 116 F.3d 334, 337-38 (8th Cir.1997) (considering 26 U.S.C. § 62(a)(1) of the Internal Revenue Code); *Cilecek v. Inova Health Sys. Servs.,* 115 F.3d 256, 260 (4th Cir.1997) (considering Title VII); *Sharkey v. Ultramar Energy Ltd.,* 70 F.3d 226, 232 (2d Cir.1995) (considering ERISA). In this context, the Supreme Court has outlined the following factors, culled from the Restatement of Agency, *see Reid,* 490 U.S. at 752 n. 31, 109 S.Ct. at 2179 n. 31, and from caselaw, as relevant to the inquiry:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the

> hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Reid, 490 U.S. at 751-52, 109 S.Ct. at 2178-79 (footnotes omitted).

[3] Both parties on appeal (and the district court below) addressed themselves to the question of whether or not O'Connor was an employee within this framework. However, we think that this analysis is flawed because it ignores the antecedent question of whether O'Connor was hired by Rockland for any purpose. As the Supreme Court suggests, the common feature shared by both the employee and the independent contractor is that they are "hired part [ies]," id., and thus, a prerequisite to considering whether an individual is one or the other under common-law agency principles is that the individual have been hired in the first instance. That is, only where a "hire" has occurred should the common-law agency analysis be undertaken.

[4][5] Other courts have agreed with this view. As the Eighth Circuit has explained, courts turn to common-law principles to analyze the character of an economic relationship "only in situations that plausibly approximate an employment relationship." *Graves v. Women's Prof'l Rodeo Assoc.*, 907 F.2d 71, 74 (8th Cir.1990). Where no financial benefit ***116** is obtained by the purported employee from the employer, no

"plausible" employment relationship of any sort can be said to exist because although "compensation by the putative employer to the putative employee in exchange for his services is not a sufficient condition, ... it is an essential condition to the existence of an employer-employee relationship." *Graves,* 907 F.2d at 73. See also *Neff v. Civil Air Patrol*, 916 F.Supp. 710, 712-13 (S.D.Ohio, 1996); *Smith v. Berks Community Television,* 657 F.Supp. 794, 796 (E.D.Pa.1987); cf. *Haavistola v. Community Fire Co.,* 6 F.3d 211, 219 (4th Cir.1993).

This "essential condition" of remuneration has been recognized in this Circuit as well. In *Tadros v. Coleman,* 898 F.2d 10, 11 (2d Cir.1990), we explicitly upheld the dismissal of the Title VII claims of a plaintiff who worked as a volunteer on the faculty of Cornell Medical College on the ground that the plaintiff was not an employee under Title VII. As a volunteer, the plaintiff received no salary, health benefits, retirement benefits, and also had no regular hours assigned to him by the hospital. In concluding that the plaintiff was not an employee, the district court in *Tadros* held that "[a] Title VII plaintiff is only an 'employee' if the defendant both pays him and controls his work." 717 F.Supp. 996, 1004 (S.D.N.Y.1989).

[6] We believe that the preliminary question of remuneration is dispositive in this case. It is uncontested that O'Connor received from Rockland no salary or other wages, and no employee benefits such as health insurance, vacation, or sick pay, nor was she promised any such compensation. [FN2] This case thus differs from *Haavistola v. Community Fire Co.,* in which the Fourth Circuit considered whether a volunteer member of a fire company was an employee for Title VII purposes where "[o]n the one hand, [plaintiff] did not

receive direct compensation as a member of the Fire Company, but, on the other hand, she did not affiliate with the company without reward entirely." 6 F.3d 211, 221 (4th Cir.1993). The court then noted that the plaintiff received, through her volunteer position, a state-funded disability pension, survivors' benefits for dependents, scholarships for dependents upon death or disability, group life insurance, and several other benefits. *See id.* The court concluded that the district court granted summary judgment improvidently, given that a factfinder should determine whether "the benefits represent indirect but significant remuneration ... or inconsequential incidents of an otherwise gratuitous relationship." *Id.* at 222.

> FN2. We reject O'Connor's claim that she was compensated to the extent that she received, through Marymount, federal work study funding for the hours of volunteer work performed at Rockland. Plainly, it was Marymount— not Rockland—that made these payments to O'Connor.

Because the absence of either direct or indirect economic remuneration or the promise thereof is undisputed in this case, we agree with the district court that O'Connor was not a Rockland employee within the meaning of Title VII and thus that her discrimination claim under that statute must fail.

II. Title IX

[7] O'Connor's second argument is that the district court erred in dismissing her Title IX claim in the belief that Title IX did not apply to Rockland because Rockland is not an "education program or activity." O'Connor urges that because

Rockland both receives federal financial assistance either through the state, its patients, or its employees, and also operates "vocational training through an organized educational program," Appellant's Brief at 30, it is subject to Title IX's prohibition against sex discrimination—proscribed conduct that includes sexual harassment. *See Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 75, 112 S.Ct. 1028, 1037-38, 117 L.Ed.2d 208 (1992); Kracunas, 119 F.3d at 88-89. We disagree.

Title IX provides in pertinent part that

> [n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a). Title IX has been construed to prohibit gender discrimination ***117** against students and employees alike in educational institutions that receive federal funding. *See Murray v. New York Univ. College of Dentistry*, 57 F.3d 243, 248 (2d Cir.1995) (citing *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 520-34, 102 S.Ct. 1912, 1917-25, 72 L.Ed.2d 299 (1982)).

At issue in the present case is whether an entity such as Rockland that (1) is a state-run clinic that receives federal money, [FN3] and (2) permits student- interns from a college with which it has no affiliation to perform volunteer field work at its facility, is subject to Title IX on the ground that it operates an "education program or activity."

> FN3. We note that O'Connor's complaint contains no allegation that Rockland receives any

> federal funding. Instead, O'Connor refers to federal funding only in her description of Marymount, a party since dropped from the case. However, because O'Connor's complaint does allege that Rockland is an agency of New York State, we will construe her complaint broadly to allege that, as a state health-care agency, Rockland receives federal money in connection with medical services provided—an inference we think equitable given that Rockland does not contest on appeal the question of federal funding.

In *Grove City College v. Bell,* 465 U.S. 555, 571-75, 104 S.Ct. 1211, 1220- 22, 79 L.Ed.2d 516 (1984) the Supreme Court considered the meaning of Title IX's phrase "education program or activity" and defined it narrowly, holding that by referring to particular activities or programs, Congress intended that Title IX apply only to the particular program receiving financial assistance. Thus, in Grove City, the Court found that the receipt by students of federal grants did not trigger institution-wide Title IX coverage, but only coverage of the school's financial aid program. *Id.* at 573-74, 104 S.Ct. at 1221-22.

In response to the Court's interpretation of Title IX, as well as out of concern that the Grove City definition of "program or activity" would be applied to similar language contained in § 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title VI of the Civil Rights Act of 1964, Congress passed the Civil Rights Restoration Act of 1987, Pub.L. No. 100-259, Sec. 3(a), § 908, 102 Stat. 28, 28-29 (1988) (codified at 20 U.S.C. § 1687) ("the 1988 Amendment"), which amended each of the affected statutes,

including Title IX, by adding a section broadly redefining the term "program or activity." *See S.Rep. No. 100-64,* at 4 (1988) reprinted in 1988 U.S.C.C.A.N. 3, 6; see also *Cohen v. Brown Univ.,* 991 F.2d 888, 894 (1st Cir.1993). The amendment to Title IX provides in relevant part:

For the purposes of this chapter, the term "program or activity" and "program" mean all of the operations of—

> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
>
> (B) the entity of such State or local government that distributes such assistance and each such department or agency ... to which the assistance [to a State or local government] is extended;
>
> (2)(A) a college, university, postsecondary institution, or a public system of higher education; or
>
> (B) a local educational agency ..., system of vocational education, or other school system....any part of which is extended Federal financial assistance.

20 U.S.C. § 1687. Following the 1988 Amendment, courts have consistently interpreted Title IX to mean that if one arm of a university or state agency receives federal funds, the entire entity is subject to Title IX's proscription against sex discrimination. *See Horner v. Kentucky High Sch. Athletic Ass'n,* 43 F.3d 265, 271 (6th Cir.1994); Cohen, 991 F.2d at 894.

[8][9] However, by modifying the phrase "program or activity," Congress left the modifier "education" intact, and we are bound under ordinary rules of statutory construction to give content to the entire phrase selected by Congress. *See Connecticut Dep't of Income Maintenance v. Heckler,* 471 U.S. 524, 530 n. 15, 105 S.Ct. 2210, 2213 n. 15, 85 L.Ed.2d 577 (1985). In so doing, we think it evident that in order to implicate Title IX in the first instance, an entity must have features such that one could reasonably consider its mission to be, at least in part, educational. That Congress intended this interpretation can be discerned, if vaguely, in the following ***118** example of the effect of the new statute, contained in the Senate Report accompanying the 1988 Amendment:

> If a private hospital corporation is extended federal assistance for its emergency rooms, the pediatrics department, admissions, discharge offices, etc., are covered under Title VI, section 504, and the Age Discrimination Act. Since Title IX is limited to education programs or activities, it would only apply to the students and employees of educational programs operated by the hospital, if any.

S.Rep. No. 100-64, at 18 (1988) reprinted in 1988 U.S.C.C.A.N. 3, 20. While expanding the reach of Title IX to include all departments or branches of an educational institution or program that receives federal funding, the foregoing suggests to us that the 1988 Amendment did not purport to alter the preliminary requirement that the entity funded operate an "education program."

Although the term "education" is not defined by the regulations governing Title IX and has not been construed by

this court, O'Connor argues that because Rockland provides its volunteers with some modicum of on-the-job training, Rockland therefore provides vocational training, and, on that basis, may be considered to operate an organized educational program. We decline, however, to convert Rockland's willingness to accept volunteers into conduct analogous to administering an "education program" as contemplated by Title IX.

Preliminarily, in light of O'Connor's contention that Rockland's internship program is analogous to vocational training, it is instructive to look to 34 C.F.R. § 106.2, which defines for Title IX purposes the term "institution of vocational education" as:

> a school or institution (except an institution of professional or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade ..., whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers fulltime study.

24 C.F.R. § 106.2(n) (emphasis supplied). Rockland plainly does not satisfy this definition, as its "primary purpose" is in no sense to educate: it accepts no tuition, has no teachers, has no evaluation process, and requires no regular hours or course of study for its volunteer workers.

Not only is Rockland's internship program not classifiable as a vocational program, Rockland also cannot be said more generally to operate an "education program" because the institution maintains none of the characteristics associated

with being an educator. The environment at Rockland is not, for example, analogous to a teaching hospital's "mixed employment-training context," *see Lipsett v. University of Puerto Rico,* 864 F.2d 881, 897 (1st Cir.1988); *Henschke v. New York Hosp.-Cornell Med. Ctr.,* 821 F.Supp. 166 (S.D.N.Y.1993). Nor is Rockland's acceptance of volunteers comparable to running an educational or vocational program at a state correctional facility, *see, e.g., Jeldness v. Pearce,* 30 F.3d 1220, (9th Cir.1994); *Women Prisoners of the Dist. of Columbia Dep't of Corrections v. District of Columbia,* 899 F.Supp. 659, 668-69 (D.D.C.1995), as such programs typically provide instructors, evaluations, and offer a particular course of training.

Finally, the fact that Marymount operates an "education program" may not be imputed to Rockland simply because O'Connor was a student at the former while she performed volunteer work with the latter. Factors that could lead to a different conclusion simply are not present here: the two entities have no institutional affiliation; there is no written agreement binding the two entities in any way; no staff are shared; no funds are circulated between them; and, indeed, Marymount students had previously volunteered at Rockland on only a few occasions. The only hint of a connection between Marymount and Rockland lies in the fact that (1) Marymount contacted Rockland for the purpose of placing O'Connor in an internship, and (2) Marymount appears to base its evaluation of its students' performance during their internships in part on an evaluation prepared by the person who supervised the student on-site—which, in O'Connor's case, would have been Lisa Punzone of Rockland. Such connections are insufficient to establish Rockland ***119** as an agent or arm of Marymount for Title IX purposes. Rather, we

think it clear that Rockland is a state- funded psychiatric hospital, with no affiliation to any educational institution whatsoever, that allows volunteers from a nearby college to perform (with minimal supervision) volunteer work at its facility. Rockland thus does not conduct an "education program or activity," and O'Connor's Title IX claim was properly dismissed.

CONCLUSION

By allowing an intern to perform the fieldwork required of her by the wholly unaffiliated college she attends, Rockland is not transformed into an employer under Title VII or into an administrator of an education program or activity under Title IX. We conclude by saying only that we are not unsympathetic to O'Connor's situation. We recognize, for example, that from her perspective, her success at Marymount was dependent to some degree on successfully completing her internship with Rockland, and that her dependency on Rockland made her vulnerable to continued harassment much as an employee dependent on a regular wage can be vulnerable to ongoing misconduct. In a similar vein, we recognize that O'Connor was not in quite the same position to simply walk away from the alleged harassment as are many other volunteers. However, it is for Congress, if it should choose to do so, and not this court, to provide a remedy under either Title VII or Title IX for plaintiffs in O'Connor's position. We therefore affirm the judgment of the district court.

APPENDIX B

United States District Court

SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED MAY 23 1996
S.D.O.N.Y./stamp

Bridget O'Connor,

Plaintiff,

-against-

Dr. James Davis, Rockland Psychiatric Center,
The State of New York, et al.,

Defendants.

---

95 CIVIL 1722 (CLB)

JUDGMENT

Whereas the above entitled action having been assigned to the Honorable Charles L. Brieant, U.S.D.J., and the Court thereafter on August 7, 1995, discontinued the action with prejudice and without costs or attorney's fees as to defendant Virginia Kaiser, individually and as The Coordinator, Social Work Field Instruction for Marymount College, and the Court thereafter on January 23, 1996, discontinued the action with prejudice and without costs or attorney's fees as against defendants Dr. James Davis, individually, Lisa Punzone, individually, James Wagner, individually and as Program Director for the Rockland Psychiatric Center, and Madeline Connolly, individually and as Director of Social Services for

the Rockland Psychiatric Center, and the Court thereafter on May 21, 1996, having handed down its memorandum and order granting summary judgment in favor of defendants Rockland Psychiatric Center and The State of New York, it is,

ORDERED, ADJUDGED AND DECREED: That the Complaint be and it is hereby dismissed as to all defendants.

Dated: White Plains, New York
May 23, 1996

James M. Parkison/signature
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIDGET O'CONNOR,

Plaintiff,

- against -

DR JAMES DAVIS, ROCKLAND PSYCHIATRIC CENTER, THE STATE OF NEW YORK et al.,

Defendants.

---

95 Civ. 1722 (CLB)

MEMORANDUM & ORDER

Brieant, J.

By motion filed March 29, 1996 and fully submitted on May 17, 1996, in this action brought for damages for sexual harassment pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) [sic] *et. seq.* and Title IX, 20 U.S.C. § 1681 *et. seq.*, as well as pursuant to 42 U.S.C. § 1983, defendants Rockland Psychiatric Center and the State of New York seek summary judgment in their favor.

This action has been dismissed as to all of the individual defendants and Marymount College, and plaintiff has discontinued so much of her claims as are based on 42 U.S. § 1983. See Dickinson Affidavit ¶8.

At all relevant times plaintiff Bridget O'Connor was a student at Marymount College in Tarrytown, New York majoring in social work. As a social work major, plaintiff was required to perform 100 hours of field work in her junior year

and 200 hours as a senior. Students involved in such work would express an interest in a particular area of social work and Marymount would attempt to place them as volunteer interns at a stable institution.

During her senior year at Marymount, plaintiff was placed at Rockland Psychiatric Center to satisfy her field work requirement leading to her degree. Prior to beginning her internship, plaintiff completed and signed a volunteer enrollment form, a volunteer service application, a statement of confidentiality for volunteers, and a criminal history for volunteers. At the start of work on each day, plaintiff signed in on the volunteer sign in sheet. Plaintiff was not compensated in any way by Rockland Psychiatric Center in connection her services there. During her senior year at Marymount, plaintiff did receive funds from the federal government for participating in a work study program. Neither the State of New York nor Rockland Psychiatric Center was aware of that the plaintiff was receiving such funds, and they did not participate in the distribution of those funds in any way.

As an intern, plaintiff was supervised and evaluated by Lisa Punzone, a clinical social worker at the Rockland Psychiatric Center. Ms. Punzone's evaluation of the plaintiff was provided to Marymount for consideration in determining the grade that the plaintiff would receive from the College for her field work. In her capacity as an intern at Rockland Psychiatric Center, plaintiff attended morning staff meetings with social workers and other interns to discuss patient treatment, progress and problems. Plaintiff was also assigned a number of patents with whom she would meet regularly, for one-on-one counseling sessions. Plaintiff also participated in group therapy sessions and provided input on patient treatment plans created by state employees.

Within the first week of her internship at the Center, plaintiff encountered defendant Dr. James Davis, a treating psychiatrist at the Center. Dr. Davis began referring to the plaintiff as "Miss Sexual Harassment". On one occasion, with Ms Punzone present, Dr. Davis suggested to the plaintiff that she was the model in a newspaper lingerie ad that he showed her. On November 16, 1994, plaintiff informed Ms. Punzone's that Davis had told her that she had to take her clothes off prior to meeting with him, adding: "don't you always take your clothes off at the doctor's office?" When the plaintiff informed Ms. Punzone of these incidents, Punzone allegedly told her to "just ignore it." Ms. Punzone maintains however, that she asked the plaintiff if she wanted the incident reported to anyone, and plaintiff specifically requested that it not be reported.

This Court concludes that as a matter of law Ms. O'Connor was a volunteer at Rockland Psychiatric Center and that her relationship with the Center was not such as to bring her within the definition of an employee for purposes of Title VII. As noted earlier, she was a full-time student at Marymount College. The action under Title IX has been discontinued as against the College. Her voluntary status at the Psychiatric Center is set forth in all of the documents having to do with her service there, including as noted above, her volunteer enrollment form, her volunteer service application, her statement of confidentiality for volunteers and her certification of no criminal history. These forms are relatively standard and are used regularly in various state service arrangements for volunteers. See Exhibits to Connolly Affidavit. In addition, plaintiff was invited to an orientation session for volunteers and signed in daily on the Volunteer Services Sign-In records for the months of September 1994

through December 1994. She received a letter welcoming her to volunteer service from the hospital. All surrounding facts justify an inference that Ms. O'Connor was a volunteer. She was not paid by the Center and received no funds or other compensatory benefits. There is no evidence that the Center or its officials knew that plaintiff was receiving money through Marymount College as a federal grantee. She received no benefits such as health insurance, vacation pay or sick pay and was not a member of the employee bargaining unit. Plaintiff was not subject to a probation period and did not receive an individual office. She possessed less skill than a regular social worker in that she had not yet obtained her college or graduate degree. Her only purpose for being at the hospital was to obtain credentials with Marymount which would permit the College to grant her a degree, and not to work for money. Plaintiff in conjunction with Marymount chose the number of hours she would volunteer, in her case 200 hours per semester, and chose the days that she would be serving, with the opportunity to make up for those days on which she arrived late.

The Rockland Psychiatric Center is not an educational institution and is not affiliated in any way with Marymount College, except that it accepts volunteers from Marymount and elsewhere.

The facts of Ms. O'Connor's relationship with the Hospital cannot as a matter of law rise to the common law agency test used by our Court of Appeals to determine if a person is an employee. See *Frankel v. Bally Inc.*, 987 F.2d 86 (2d Cir. 1986), *Community For Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) at 741-52. To treat volunteers in the context of this case (2 days per week during 2-1/2 months) as employees would have undesirable long range effects on the ability of

colleges to place students in a situation where they could complete their field work, which is essential to most educational programs, without imposing undue burdens on a working hospital.

Because the Court regards the lack of status of the plaintiff as an employee within Title VII as controlling, we do not reach the contentions made in support of this motion that the allegations do not rise to the level of sexual harassment. The Court concludes that Title IX is inapplicable to the Center and believes that it was cited in the complaint at a time when the defendants included Marymount College.

The motion is granted. The Clerk shall file a final judgment.

SO ORDERED.

Dated: White Plains, New York
May 20, 1996

CHARLES L. BRIEANT/signature
Charles L. Brieant, U.S.D.J.